Supreme Court, U.S.
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No. 93-1491

In the

Supreme Court of the United States

October Term, 1993

TONKA CORPORATION,
a Minnesota corporation,

Petitioner,

v.

BITUMINOUS CASUALTY CORPORATION,
THE TRAVELERS INSURANCE COMPANY,
NORTH RIVER INSURANCE COMPANY,
GREAT AMERICAN INSURANCE COMPANY,
INDUSTRIAL INDEMNITY COMPANY,
ZURICH INSURANCE COMPANY,
UNITED STATES FIRE INSURANCE COMPANY,
MISSION NATIONAL INSURANCE COMPANY,
TWIN CITY FIRE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Respondent Twin City Fire Insurance Company's parent company is Hartford Fire Insurance Company, which is owned by ITT Hartford Insurance Group.

Respondent Bituminous Casualty Corporation is a subsidiary of Bitco, which is owned by Old Republic International Group.

Respondent The Travelers Insurance Company is owned by The Travelers Inc. (formerly Primerica Corp., successor to The Travelers Corporation) Associated Madison Companies, Inc. and The Travelers Insurance Group Inc. its' subsidiaries are Commercial Credit Company, Smith Barney Shearson Holdings Inc., and Travelers Mortgage Securities Corporation.

Respondent Great American Insurance Company is one of the Great American Insurance Companies, a subsidiary of American Financial Corporation.

Respondent Zurich Insurance Company is a member of the Zurich-American Insurance Group its' parent company is Zurich Insurance Company of Switzerland.

Respondent Mission Insurance Companies Trust, Trustee California Insurance Commissioner was formerly known as Mission National Insurance Company was a subsidiary of Mission Insurance Group.

Respondents U.S. Fire Insurance Company, Industrial Indemnity Insurance and North River Insurance Company parent companies and subsidiaries are: Xerox Corp., Xerox Financial Services, Inc., Crum & Forester, Inc., International Ins. Co., Seaboard Underwriters, Inc., Seaboard Underwriters Agency, Inc., Premier Ins. Co., International Marine Underwriters of New England,

Inc., Crum & Forester Underwriters of Ohio, Crum & Forester Insurance Company (Bermuda) Ltd., Westchester Fire Ins. Co., Mt. Airy Ins. Co., Star Ins. Co., Industrial Indemnity Co., Viking Ins. Co. of Wisconsin, Viking General Agency, Inc., Viking Mutual Ins. Co., Richard Whiley, Inc., International Surplus Lines Ins. Co., Crum & Forester Managers Corp. (Fla.), Savings Ins. Exchange Group Agency, Inc., Crum & Forester Benefit Managers Corp., Home Underwriters, Inc., The Savings Ins. and Retirement Plan Group, Inc., Financial Ins. Management Agency, Inc., Industrial Underwriters Ins. Co., All West Ins. Co., Industrial Ins. Co. of Hawaii, Ltd., Industrial Indemnity Co. of Alaska, Industrial Indemnity Co. of the Northwest, California Ins. Co., Industrial Indemnity of Idaho, CALPAC Holding Co., Inc., CALPAC Ins. Co. Ltd., Claremont Holdings, Ltd., Claremont Ins., Ltd., Constitution Reins. Corp., Constitution Reassurance S.A., Constitution Management Corp., The London Agency, Inc., Floyd West & Company, and Commonwealth Lloyd's Ins. Co.

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Tonka Corporation,
a Minnesota corporation,

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v.

Bituminous Casualty Corporation,
The Travelers Insurance Company,
North River Insurance Company,
Great American Insurance Company,
Industrial Indemnity Company,
Zurich Insurance Company
Mission National Insurance Company,
Twin City Fire Insurance Company,

Respondents,

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

RESPONDENTS JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. INTRODUCTION

This case involves the straightforward interpretation of standard form insurance policies sold by Respondents ("the Insurers") to Petitioner, Tonka Corporation ("Tonka"), from the 1950s until 1986. The policies provide coverage for unexpected, unintentional "accidents" or "occurrences" only. Some of the policies contain exclusions for "occurrences" involving the release, escape or dispersal of pollutants when such releases are "sudden or accidental."

In 1981, Tonka learned that storm sewers at its plant site ("the Site") in Mound, Minnesota contained elevated levels of trichlorethylene ("TCE"), a solvent that Tonka had used to degrease toys it manufactured at the Site. In 1984, the State of Minnesota notified Tonka that a monitoring well on its property showed the presence of TCE in the groundwater at the Site. Thereafter, Tonka voluntarily agreed to monitor the contamination and notified the Insurers of a claim under the policies.

Bituminous Casualty Corporation filed this declaratory judgment action for the purpose of obtaining an order that no coverage existed under the policies it issued to Tonka. Tonka counterclaimed against Bituminous and made third-party claims against the rest of the Insurers for coverage.

Both the district court and the court of appeals found that TCE was present in the groundwater because of Tonka's practice of intentionally dumping degreaser wastes containing TCE on the ground at the Site. The courts both held, therefore, that Tonka had failed to produce the requisite evidence to refute the conclusion that no covered "accident" or "occurrence" had taken place as required by the policies. The courts also held that the various pollution exclusions applied to Tonka's claims since the releases of TCE were not sudden and accidental.

A petition for writ of certiorari should not be granted in this case. The case does not involve novel issues. The courts below were merely called upon to engage in routine contract interpretation pursuant to state law. The district court, as affirmed by the court of appeals, properly applied the summary judgment standard enunciated by this Court to these contract issues. In addition, the issues addressed by the lower courts were not the type which should have been certified to the Minnesota Supreme Court since they involve well settled principles of insurance policy interpretation under Minnesota law. In sum, none of the standards set forth in Supreme Court Rule 10.1 are present in this case, and Tonka's Petition should be denied.

II. The District Court Decision

The Insurers moved for summary judgment before the district court citing Tonka's routine practice of disposing of TCE waste on the ground at the Site.

The Insurers asserted that Tonka had failed to prove an "accident" or "occurrence" under the policies. In addition, the Insurers argued that the "sudden and accidental" pollution exclusions applied to Tonka's claim because of these facts.

The district court agreed. The district court cited the summary judgment standards pronounced by this Court in the seminal case of Celotex Corp. v. Catrett, 477 U.S. 317 (1986) and correctly interpreted this case as requiring Tonka to "show through specific evidence that there are material facts in dispute creating a genuine issue for trial..." The district court then reviewed the evidence presented by the Insurers in their Motion, including evidence regarding Tonka's intentional dumping of TCE at the Site during at least the 1950s,[1] evidence concerning Tonka's undisputed knowledge of the dangers of TCE during this

[1] The district court also recognized that at least one employee testified that Tonka dumped waste oil on the property as late as 1983.

period and evidence regarding the presence of TCE in the waste degreaser oil which was dumped on-site. The court also recognized that Tonka had failed to present sufficient evidence to refute the Insurers' evidence that Tonka's dumping of wastes resulted in groundwater contamination.

After properly interpreting Minnesota law which holds that the policy terms "accident" and "occurrence" are unambiguous and must be interpreted by an objective standard, the court reviewed the above evidence and held that Tonka had failed to provide evidence of a covered claim as a matter of law. The court also held that Tonka had failed to produce the necessary evidence of a "sudden or accidental" release of pollutants and was, therefore, denied coverage under the pollution exclusions in the relevant policies.

III. The Court of Appeals Decision

The court of appeals agreed with the district court that Tonka had failed to produce sufficient evidence to withstand summary judgment on the "accident" or "occurrence" issues.

The court of appeals recognized the objective standard associated with these policy terms and held that no coverage exists in Minnesota where the insured "knew or should have known" that its actions would result in certain consequences, citing Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 720 (8th Cir. 1981).

With this standard in mind, the court of appeals reviewed the record before the district court and concluded that the undisputed evidence showed the following:

1. Tonka routinely disposed of hazardous waste on the ground at the Site during the 1950s and perhaps as late as 1978.

2. Tonka knew or should have known that the hazardous waste from its' manufacturing operation contained hazardous substances.

3. Tonka knew or should have known that its' hazardous substances or industrial waste products could harm the environment.

The court of appeals reviewed the evidence submitted by Tonka and agreed with the district court that this evidence failed to create a material dispute. The court correctly concluded that the evidence submitted did not create a material dispute about the intentional nature of the hazardous waste discharges.

Finally, the court, citing its recent decision in Bureau of Engraving v. Federal Ins. Co., 5 F.3d 1175 (8th Cir. 1993), summarily held that the pollution exclusions in some of the policies applied to the damage arising from Tonka's "ongoing and routine" disposal of hazardous waste as a matter of law.

REASONS FOR NOT GRANTING THE WRIT

I. THE COURT SHOULD NOT ATTEMPT TO FURTHER CLARIFY THE SUMMARY JUDGMENT STANDARD BY GRANTING CERTIORARI IN THIS CASE.

A. The Summary Judgment Standard Is Well-Established and Needs No Further Clarification.

In 1986, this Court issued three decisions which established the standard to be applied to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). That trilogy of

cases "breathed new life into summary judgment practice." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989); see also William W. Schwarzer et al., The Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441, 445 (1991). Specifically, Anderson, Celotex and Matsushita signaled the lower courts to set aside the disfavor with which they had long viewed motions for summary judgment and to recognize summary judgment as a useful tool for "weeding out frivolous lawsuits and avoiding wasteful trials." 10A Charles A. Wright et al., Federal Practice & Procedure: Civil 2d § 2727 (Supp. 1994). To that end, the Celotex opinion expressly stated that summary judgment procedure "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." 477 U.S. at 327.[2]

Contrary to Tonka's contentions, there is no indication that the lower courts misunderstood the summary judgment standard in this case.[3] Moreover, Tonka has failed to demonstrate that

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[2] This is not a good case for discussing the denial of the right to a jury trial. Neither Tonka nor any of the other parties named in the petition ever demanded a jury trial in this declaratory judgment action. To the extent that the Court wishes to address that issue, it should do so in a case where that issue is clearly implicated and has been discussed by the lower courts.

[3] Tonka unfairly chastises the lower courts for failing to detail the summary judgment standard that they employed in this case and improperly accuses the district court of using a "post judgment analysis." Cert. Petition at 16-17. The chief judge of the district court clearly, though briefly, set forth the appropriate standard in her Memorandum Opinion and Order. Appendix to Cert. Petition at A-24 - A-25. Though the Eighth Circuit opinion does not specifically lay out the summary judgment standard, the discussion in the opinion of Tonka's failure to raise a genuine issue of material fact demonstrates that the Eighth Circuit applied the proper standard when it affirmed the judgment of the district court. Id. at A-9. Further, other decisions demonstrate that the Eighth Circuit understands and applies the appropriate summary judgment

other courts are confused about the proper standard to be applied to summary judgment motions. Tonka's fervent desire to avoid the application of well-settled Minnesota law simply cannot justify the complete abrogation of Rule 56 which Tonka champions in its Petition.

II. CERTIFICATION TO THE STATE SUPREME COURT WAS UNNECESSARY.

A. THE LOWER COURTS APPLIED SETTLED STATE LAW.

In a diversity case, a federal court applies the substantive law of the forum state. Recognizing that Minnesota's substantive law was clear, Chief Judge Murphy applied it without certification as have other courts in this district.[4] The established substantive law of Minnesota does not favor petitioner's position. Petitioner's complaint that certification to the Minnesota Supreme Court was necessary[5] is without merit. It is unnecessary for this Court to review the lower courts judicial discretion.

Use of the certification process is not obligatory. Salve Regina College v. Russell, 449 U.S. 225 n. 4 (1991), citing Lehman Brothers v. Schein, 416 U.S. 386, 390-391 (1974). Its use rests in the sound discretion of the federal court. Id.

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standard. See, e.g., Miller v. U.S. Dep't of Agric., 13 F.2d 260, 262 (8th Cir. 1993); Gregory v. City of Rogers, Ark., 974 F.2d 1006, 1010 (8th Cir. 1992); Hartnagel v. Norman, 953 F.2d 394, 395-96 (8th Cir. 1992).

[4] See ie., Bell Lumber & Pole Co. v. U.S. Fire Ins. Co., ___ F.Supp. ___ (1994 WL 96753 (D.Minn. 1994))(J. Doty); and Bureau of Engraving v. Federal Ins. Co., 793 F.Supp 209 (D.Minn. 1992)(J. Magnuson).

[5] Petitioner fails to note that it has never brought a Motion for Certification. See, Minn. Stat. §480.061 Subd.2. (1990). In essence, Petitioner now complains that the district court and the appellate court failed to do what it has never done.

Certification to determine the meaning of the phrase "sudden and accidental" found in the standard pollution exclusion was unnecessary. State law had been established on point. The Erie Doctrine[6] requires federal courts to apply the same state law that would be applied if the case arose in state court. See, 19 Charles A. Wright et al., Federal Practice & Procedure §4507 (1982). If this case had arisen in state court, the state court would have applied the same established law that was applied against the petitioner by the federal district court.

The Minnesota Court of Appeals had published[7] three decisions directly on point addressing the pollution exclusions issues Tonka sought to have certified to the Minnesota Supreme Court. Each of these appellate decisions was followed by a petition for review, all of which were subsequently denied review by the Minnesota Supreme Court.[8] See Krawczewski v. The Western Casualty & Surety Co., et al, 506 N.W.2d 656 (Minn.Ct.App. 1993), pet. for rev. denied (1993); Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 503 N.W.2d 793

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[6] Based on Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[7] The court of appeals may publish only those decisions that: (1) establish a new rule of law; (2) overrule a previous court of appeals' decision not reviewed by the supreme court; (3) provide important procedural guidelines in interpreting statutes or administrative rules; (4) involve significant legal issues; or (5) would significantly aid in the administration of justice. Unpublished opinions of the court of appeals are not precedential. See Minn. Stat. §480A.08 subd.3 (c) 1990.

[8] The supreme court may grant review of any decision of the court of appeals upon the petition of any party. In determining whether to grant such a petition, the supreme court should take into consideration whether the question presented is an important one upon which the court has not, but should rule, whether the court of appeals has decided a question in direct conflict with an applicable precedent of the supreme court, or whether the lower courts have so far departed from the usual course of justice as to call for an exercise of the court's supervisory powers. See, Minn. Stat. §480A.10 Subdivision 1.

(Minn.Ct.App. 1993), pet. for rev. denied (1993); and Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 480 N.W.2d 368 (Minn.Ct.App. 1992), pet. for rev. denied (1992).

It is well established that where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. West v. American Tel. & Tel. Co., 311 U.S. 223, 236-237 (1940); See also, Hicks v. Feiock, 485 U.S. 624, 630 (1988).

The district court correctly characterized Minnesota case law as "clear". The district court and the appellate court recognized their duty and applied existing state law. Had this case arisen in state court, the outcome would not have changed. See ie., Dakhue Landfill v. Employers Ins., 508 N.W.2d 798 (Minn. Ct. App. 1993); City of Maple Lake v. American States, 509 N.W.2d 399 (Minn. Ct. App. 1993). Certification of this case was unnecessary. The district court and the appellate court properly exercised sound judicial discretion.

B. PUBLIC POLICY WAS NOT A PROPER ISSUE FOR CONSIDERATION.

This was a simple insurance coverage case involving the application of facts to the insurance contracts. In Minnesota, the interpretation and construction of an insurance policy is a matter of law. Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 503 N.W.2d 793, 795 (Minn.Ct.App. 1993), pet. for rev. denied (1993), citing Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887 (Minn. 1978).

The petitioner incorrectly asserts that the resolution of these contract interpretation issues mandates public policy considerations. The Minnesota Supreme Court, in an insurance coverage case, has stated that public policy considerations more

properly bear on the issue of contract validity than contract interpretation. Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209, 215 n.6 (Minn. 1984).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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